No. 14628

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NICK ALLEN KLUBNIKIN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of California, Central Division, The Honorable James M. Carter, Presiding.

APPELLANT'S REPLY BRIEF.

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I.

The Registrant Was Entitled to Reclassification Notwithstanding His Status as a Conscientious Objector.

The main thrust of appellee's rebuttal stems, it seems, from its construction of section 1622.30(b) of the Selective Service Regulation (hereinafter referred to as the Regulations, and sometimes as SSR) which provides as follows:

> "(b) In Class III-A shall be placed any registrant whose induction *into the armed forces* would result in extreme hardship and privation (1) to his wife, divorced wife, child, parent, grandparent, brother, or sister who is dependent upon him for support, or (2) to a person under 18 years of age

> or a person of any age who is physically or mentally handicapped whose support the registrant has assumed in good faith; provided, that a person shall be considered to be a dependent of a registrant under this paragraph only when such person is either a citizen of the United States or lives in the United States, its Territories, or possessions." (Italics added.)

In effect, it is the government's position that a registrant is ineligible for a III-A classification unless there is what might be termed a "clear and present danger" of his induction into military service (Appellee's Br. pp. 8-10). Since the appellant was classified as a conscientious objector (I-O), so it is argued, his exemption from military service is assured, and, therefore, the kind of hardship envisioned by Congress and the President could not possibly flow to him because the civilan duties to which he was assigned would keep him at home, and in good salary (Appellee's Br. p. 9).

The weakness of this reasoning is signified by the absence of any supporting authority in the appellee's brief. Moreover, it ignores Section 1623.2 of the Regulations which provides that:

> "Every registrant shall be placed in Class I-A under the provisions of section 1622.10 of this chapter except that when grounds are established to place a registrant in one or more of the classes listed in the following table, *the registrant shall be classified in the lowest class* for which he is determined to be eligible, with Class I-A-O considered the highest class and Class I-C considered the lowest class according to the following table:

Class: I-A-O	Class: IV-A
I-O	IV-B
I-S	IV-C
II-A	IV-D
II-C	IV-F
II-S	V-A
I-D	I-W
III-A	I-C"

(Italics added);

and overlooks, too, the complete absence of any regulation or law which precludes successive, and even inconsistent deferment claims (*United States v. Peebles* (7 Cir.), 220 F. 2d 114, 118).

The President has not excepted conscientious objectors from making application for a different type of deferment. On the contrary, the President has provided that *every* registrant who can establish eligibility for a lower classification *must* be placed therein (SSR 1623.2). Appellant's classification at the time of his conviction was I-O,[1] a higher classification than the III-A which he requested. Plainly, therefore, unless the regulations expressly provide to the contrary, which they do not, the appellant is entitled as of right to a consideration of his claim to III-A classification, regardless of his present status as a conscientious objector.

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[1]The government in its brief (p. 9) obliquely refers to I-W registrants (conscientious objectors performing civilian work); but while this classification is lower than III-A, appellant was ineligible therefor because he had not qualified under the applicable regulation, SSR 1622.16, which requires that the registrant:

> ". . . has entered upon and is performing civilian work contributing to the maintenance of the national health, safety, or interest, in accordance with the order of the local board . . ."

Nor had the local board released him from such civilian duty.

The government, in advancing the contrary contention, places undue emphasis on that portion of section 1622,30 (b) of the Regulations which reads:

> ". . . whose induction *into the armed forces* would result in extreme hardship . . ."

Appellee construes that language to mean *actual* or *imminent* induction. But such an interpretation is completely unwarranted, and the government has failed to support this view with either legislative history, or judicial precedent. If the President had so intended, as is claimed, those words could and should have been expressly supplied in the Regulation, rather than left to dangle as an afterthought from inference and speculation.

We agree with the appellee that the wording of section 1622.30(b) probably suggests that the degree of hardship upon the registrant's family is to be tested by the impact upon them of his service in the armed forces. But it does not follow at all that the registrant must be in imminent peril of induction, or even that his induction be plausible, in order to qualify for a III-A classification.

III-A is but one of sixteen classifications into which a qualified registrant may be placed for deferment. I-O is another such classification. In each case, of course, the alternative to deferment is military service. No classification is permanent, however (SSR 1625.1), and, therefore, a deferred registrant may be reclassified into military service at any time. It is against common sense to argue that a deferred registrant must await his reclassification into I-A before claiming III-A. Indeed, in so doing the registrant not only violates SSR 1625.1(b),

requiring registrants to notify the local boards of a change of status, but additionally, the registrant lays himself open to the charge of insincerity.

In sum, therefore, section 1622.30(b) provides that *"any registrant"* shall be placed in III-A who demonstrates eligibility therefor, and he is entitled to the lowest classification for which he establishes qualification (SSR 1623.2). Every registrant is entitled to claim successive deferments on different grounds (*United States v. Peebles* (7 Cir.), 220 F. 2d 114; *United States ex rel. Hull v. Sulter* (7 Cir.), 151 F. 2d 633; *Taffs v. United States* (8 Cir.), 208 F. 2d 329). There is no regulatory or statutory provision disqualifying conscientious objectors from claiming or receiving exemptions for hardship. Hence, if appellant can establish his eligibility for such a classification, he is entitled to be placed in that category.

II.

The Appellant Was Deprived of Due Process of Law by the Failure of the Regulations to Permit Appeal From the Local Board's Refusal to Reopen His Classification.

The government next argues that a registrant is not entitled to appeal from the decision of a local board not to reopen his classification because if such a right were to exist, there would be no end to administrative procedures (Appellee's Br. pp. 14-15).

This point was fully covered by appellant in his opening brief (pp. 6-11) so that the discussion here may be confined to a few words of emphasis.

The blunt fact is that this contention of the government does not answer the imperative and constitutional need for fair administrative procedures so obviously lacking in this case. What appellee is saying is that regardless of the merits of a deferment claim, the local board may slam the door upon the further pursuit by a registrant of his rights. Correlatively, this argument also opens much wider the door of the courts to whom the registrant must then look for redress.

If a registrant is entitled to make successive claims to deferment on different grounds (*United States v. Peebles, supra*), and is entitled to a fair consideration of those claims (*United States v. Peebles, supra; United States v. Greene,* 220 F. 2d 793; *United States v. Brown,* 129 Fed. Supp. 237), then it follows that he has a minimal right to be heard in behalf of that claim (*Talcott v. Reed,* 217 F. 2d 360, 362; *United States v. Greene,* 220 F. 2d 793), and to have that claim passed upon by a higher administrative tribunal (*Mintz v. Howlett* (2 Cir.), 207 F. 2d 738, 762; *United States v. Fry* (2 Cir.), 203 F. 2d 638, 640; *United States v. Stiles* (3 Cir.), 169 F. 2d 455, 459; *Davis v. United States* (6 Cir.), 199 F. 2d 689, 691; *Knox v. United States* (9 Cir.), 200 F. 2d 398, 401-402; *United States v. Peebles,* 220 F. 2d 114, 120).[2]

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[2]For reasons given, we do not here pause to reargue the question of whether appellant's letters constituted an appeal.

III.

The Local Board's Refusal to Reopen Appellant's Classification Was Arbitrary and Capricious.

A.

The Scope of the Board's Discretion Generally.

Whether or not the local board has an absolute discretion in disposing of requests for reopening a classification is a matter of considerable doubt. Certainly it is clear that there are some severe limitations on the exercise of that power imposed by both the Regulations and by the Courts. For example, section 1622.30(b) of the Regulations makes compulsory the classification of a registrant into III-A where he establishes eligibility therefore. Section 1623.2 of the Regulations provides that a registrant is entitled as a matter of right to the lowest classification for which he is eligible. Furthermore, when there comes to the attention of the board information indicating a registrant's eligibility for a different classification, it is bound to reclassify the registrant, or at least give him notice of the action contemplated (SSR 1625). Additionally, the latter Regulation requires each registrant to notify the local board of a change of status, presumably to permit the board to correctly classify the registrant in accordance with his then present status.

Thus, the discretion of the Board in reopening classifications cannot be as broad as is suggested by the government, for if a registrant is to be properly and correctly classified, and if the registrant is entitled as of right to the lowest classification for which he is eligible, then

the Board is under an obligation to reopen a classification, under the foregoing conditions, if only to ascertain the merits of the claim.

The one judicial decision cited by appellee, as advocating the opposite rule, *Skinner v. United States* (9 Cir.), 215 F. 2d 767, did not involve the right to appeal a classification, but only whether it was necessary to do so.

In any event, it cannot be gainsaid that the board has a continuing duty to hear the merits of a claim (at least one not patently frivolous) (*Talcott v. Reed,* 217 F. 2d 360, 364), and to properly classify each registrant according to the status which he has established, irrespective of formal regulatory procedures. These are not adversary proceedings, and the technical niceties of law have no place in them. Rather the emphasis should be toward the fair administration of the Selective Service program, and its application to all registrants in equal proportion in accordance with common sense and justice. The Court of Appeals for the Seventh Circuit expressed this view quite simply, but effectively, in *United States v. Greene,* 220 U. S. 792 at p. 793:

> "Selective Service System means just that. It is the sifting and testing process by which individual eligibility, exemption and deferment are determined with Congressional blueprints and enunciated legislative policy. While classification is the democratic method for obtaining military man-power *it is not an adversary proceeding* between Board and registrant in which the slightest mis-step mechanically penalizes registrants.
>
> "In these times men everywhere closely watch how this Nation administers its laws and follows announced principles. The vitality of tolerance lies in substance and results, not in mere lip service." (Italics added.)

B.

The Board Abused Its Discretion in This Case by Refusing to Reopen the Appellant's Classification.

Assuming arguendo, that it is discretionary with the board as to whether a classification warrants reopening, nonetheless the local board abused its discretion in this case.

It is well established by now that the decision of a local board will be set aside by the courts if it is arbitrary or unreasonable (*Dickinson v. United States,* 346 U. S. 389; *Cox v. United States,* 332 U. S. 442; *Simmons v. United States,* 75 S. Ct. 397; *Sicurella v. United States,* 75 S. Ct. 403; *Talcott v. Reed* (9 Cir.), 217 F. 2d 360, 363; *Moon v. United States,* 220 F. 2d 730; *United States v. Peebles,* 220 F. 2d 117; *United States v. Brown,* 129 Fed. Supp. 237.) This court's decision in *Talcott v. Reed,* relied upon by the government for a contrary proposition, implicitly recognizes in its holding (that hardship had not been sufficiently demonstrated by the registrant (p. 363)), that an arbitrary refusal of a local board to reopen will not be left unmolested by the court.

The abuse of its discretion by the board here was two-fold: First, and primarily, in refusing to reopen appellant's classification, even though it might subsequently decide that appellant's claim did not constitute adequate grounds for reclassification into III-A; and second, in the failure of the board to reclassify registrant into III-A. A decision favorable to the appellant on the first ground obviates the necessity of reaching the second, and necessarily leaves to the board consideration of the merits of appellant's claim in its discretion. We leave to the opening brief, and to oral argument, the merits of this claim, and pass, therefore, to the first ground only.

It is quite apparent that the board gave short shift to appellant's claim to III-A classification, having replied to them in an haste which belies fair evaluation of registrant's letters[3] (Compare: *United States v. Peebles,* 220 F. 2d 114).

Of possibly greater significance, however, is the intimation in appellee's brief (at pp. 12-13) that it was against board policy to grant a III-A classification to I-O registrants (conscientious objectors). If this is in fact board policy, then obviously the board did not even consider the merits of appellant's request for III-A classification, and hence, it deprived him of due process of law (*Talcott v. Reed,* 117 F. 2d 360, 364; *United States v. Peebles,* 220 F. 2d 117; *United States v. Brown,* 129 Fed. Supp. 237).

The analogy to *Talcott v. Reed,* and *United States v. Brown,* is plain. In *Talcott,* this court held as error, *inter alia,* the board's failure to afford the registrant an opportunity to appear personally in behalf of his claim. Similarly, the appellant here has not been accorded the opportunity to establish his claim of hardship; has not been able to gain a fair appraisal of the claim.

In *Brown,* the local board had refused to reopen a registrant's I-A classification so as to permit him to file a claim of conscientious objection to war, apparently on the theory that the claim came too late. The court entered a judgment of acquittal, stating (at p. 238):

> "It is evident that the board did one of two things —either it failed to consider the applicant's request for change of classification to that of conscientious objector, or it failed to find sufficient reason therein to warrant such change! If the first be the fact,

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[3]See: Opening brief, p. 12; SSF—101; 119.

then the board acted arbitrarily and deprived the registrant of a right. If the second alternative was the one pursued, *then the board acted arbitrarily in not reopening and considering the alleged change of status, since there is nothing in the record to offset the statement alleged in the application for reclassification as a conscientious objector. Dickinson v. U. S.*, 346 U. S. 389, 74 S. Ct. 152, 98 L. Ed. 64." (Italics added.)

Manifestly, there is nothing in the evidence here which refutes the truth of the registrant's claim to a III-A status, although the facts submitted by appellant were susceptible of objective appraisal. There is no evidence upon which the board could predicate its refusal to reopen appellant's classification, unless the board deemed the claim tardy, and, therefore, unbelievable.[4] If this is the basis for the board's decision, then its decision is again invalid, for, as we pointed out in our opening brief (pp. 17-19), the sincerity of a claim for deferment does not depend upon the timeliness of its presentation (*United States v. Peebles* (7th Cir.), 220 F. 2d 114; *Moon v. United States* (5th Cir.), 220 F. 2d 730; *United States v. Brown, supra*).

In the *Peebles* case, the registrant applied for deferment as a conscientious objector, but only after he had exhausted all other available classifications, and after he had satisfactorily passed his physical examination preparatory to his induction. The board rejected his claim for I-O as insincere, but the Court of Appeals for the Seventh Circuit reversed, holding that the board was required to give fair and impartial consideration to the registrant's claim regardless of when made.

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[4]A view apparently held, at least, by the District Court below. [See T. R. 25, 35, 44.]

In *Moon v. United States,* a conviction based upon the board's refusal to entertain a claim of conscientious objection was set aside by the court, notwithstanding the belated claim thereto, plus the failure of the registrant to appear at an interview to determine the sincerity and nature of his claim.

Here, not only was the appellant unable to appeal the Board's decision, but he was not even afforded the opportunity to appear personally in behalf of his claim, or to secure a fair consideration of that claim.

It is respectfully submitted, therefore, that the refusal of the local board to reopen appellant's classification rests either upon erroneous grounds, or upon no grounds at all, and is therefore an invalid and improper decision which cannot lawfully support appellant's conviction.

The other arguments advanced by appellee appear to have been amply covered in our opening brief, and it would only be repetitious to reply to them here. Therefore, we leave these matters to oral argument, but with the admonishment that the absence of further rebuttal should not be construed as an acknowledgment or concession of the validity of the other of the government's contentions.

Conclusion.

The judgment of conviction entered by the court below should be reversed and set aside.

Respectfully submitted,

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